EVEREADY MANUFACTURING (PTE) LTD

v.

EXPLAST INDUSTRIES SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[COMPANIES (WINDING UP) NO: 28-84 OF 1996]
27 NOVEMBER 1996

COMPANY LAW: *Winding up - Provisional liquidator - Appointment of - Whether may be appointed before winding-up order obtained - Whether ex parte application for appointment requires undertaking as to damages - Companies Act 1965, s. 231 - Companies (Winding-up) Rules 1972, r. 35(1)*

COMPANY LAW: *Winding up - Petition - Leave of court - Whether leave must be obtained before filing fresh petition - Companies Act 1965, s. 221(2)(e)*

COMPANY LAW: *Winding up - Statutory notice - Service - Unserved demand notice - Whether an incurable defect - Use of same notice in different cases - Whether prohibited - Companies Act 1965, s. 218(2)(a)*

COMPANY LAW: *Winding up - Insolvency - Meaning of "unable to pay its debts" - Companies Act 1965, s. 218(2)(c)*

The applicant had presented a petition to wind up the respondent, and had successfully applied *ex-parte* for the appointment of a provisional liquidator. The respondent sought to impugn the appointment order, and set aside the petition, and argued before the learned judge, *inter alia*, that: (i) *res judicata* applied as a similar application to appoint a provisional liquidator was filed by the petitioner before another judge, where the the learned judge, having made an order similar to the appointment order herein, had set aside that order; (ii) the petitioner had not obtained a winding up order before the appointment of the provisional liquidator; (iii) since the other similar application was withdrawn, a fresh winding-up petition, like the instant one, could only be filed with leave of court; (iv) the petitioner had failed to give an undertaking as to damages in its *ex parte* application; (v) the statutory notice was not served on the respondent's registered office and this was an incurable defect that went to the very root of s. 218(2)(a) of the Companies Act 1965 ('the Act'); (vi) the petitioner's affidavits were affirmed by its sales manageress who was not a "principal officer" under r. 26 of the Companies (Winding-up) Rules 1972 ('the Rules'); and (vi) the affidavit in support of the application to appoint a provisional liquidator was inaccurate and contained material non-disclosure, in that it failed to disclose that the same notice of demand was used in the instant case as was used in the other similar case.

Held:

[1] The order in the other similar case was set aside because the petition was withdrawn for want of technicality. That did not constitute adjudication of the whole matter. The doctrine of *res judicata* thus did not apply.

[2] Section 231 of the Act allows the court to appoint a provisional liquidator after the filing of a petition but before the making of a winding-up order. There is therefore no merit in the argument that the petitioner must obtain a winding up order prior to the appointment of the provisional liquidator.

[3] Section 221(2)(e) of the Act purposely leaves out the issue of leave. That being the case, there was no necessity for the petitioner to obtain leave before filing the fresh petition.

[4] Section 231 of the Act and r. 35(1) of the Rules do not lay down the requirement that there must be an undertaking as to damages before the appointment of a provisional liquidator. It is entirely up to the court to specify whether the petitioner should give such an undertaking.

[5] The respondent had on 1 March 1996 lodged a notice of change of address of its registered office with the Registrar of Companies. In the circumstances, it was proper of the petitioner to have served the statutory notice at the respondent's new address. Defective service of a statutory demand, in any case, is curable under s. 355 of the Act and r. 194 of the Rules.

[6] Section 4 of the Act defines "officer" as to include any employee of the corporation. The sales manageress as an employee of the petitioner is a principal officer capable of and competent to verify the affidavits filed in the instant case.

[7] The Act or the Rules do not prohibit the petitioner to utilise the same statutory notice of demand as was used in the other similar case provided all the requirements of s. 218(2)(a) of the Act have been fulfilled. A non-disclosure of a non-material point is an irregularity that is curable under s. 355 of the Act and by r. 194 of the Rules.

[8] The words "unable to pay its debts" in s. 218(2)(c) of the Act are capable of being interpreted in two ways. One way would be that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. The other way would be to look at insolvency in its commercial sense. The test of commercial insolvency is whether a company is able to meet its current debt as they fall due. A company may still be insolvent even if it has substantial assets especially when those assets cannot be immediately realised to pay current debts. This test of commercial insolvency is extended to a level where a

company, even though on liquidation, may have assets sufficient to discharge all its liabilities. The respondent was insolvent as they were not able to pay current debts and there was no *bona fide* dispute as to the debt incurred by the respondent.

[Application to set aside petition dismissed.]

Case(s) referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 ***(dist)***
Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors [1986] 1 CLJ 493 ***(dist)***
Art Trend Ltd v. Blue Dolphin (Pte) Ltd [1983] 1 CLJ 342 ***(cit)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(aff)***
Bank Bumiputra Malaysia Bhd v. Azlan Hashim [1994] 3 CLJ 603 ***(dist)***
Bowes v. Hope Life Insurance & Guarantee Co [1865] 11 HL Cas 389 ***(foll)***
Capper v. Baldwin [1965] 2 QB 53 ***(foll)***
Chan Yuow Seng v. Ling Ong Hua [1995] 2 MLJ 580 ***(aff)***
Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Pelikuidasi) Chi Liung & Sons Sdn Bhd [1996] 3 CLJ 86 ***(refd)***
Chin Yoon Timber Co v. Overseas Lumber Bhd [1978] 2 MLJ 173 ***(refd)***
Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424 ***(refd)***
Corocraft v. Pan-Am [1969] 1 QB 616 ***(foll)***
Cymun Development Sdn Bhd v. Supermax Sdn Bhd [1996] 1 CLJ 545 ***(refd)***
F Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry [1974] 2 All ER 1128 ***(cit)***
Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21 ***(refd)***
IOC Australia Pty Ltd v. Mobil Oil Australia [1975] 49 ALJR 176 ***(cit)***
Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd [1990] 1 CLJ 292 ***(refd)***
Lim Tok Chiow v. Dian Tong Credit & Development Sdn Bhd [1994] 4 CLJ 155 ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 88 ***(refd)***
Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 2 MLJ 53 ***(cit)***
New India Assurance Co Ltd v. Karam Singh [1972] 2 MLJ 26 ***(aff)***
Ng Tai Tuan v. Chng Gim Huat Pte Ltd [1991] 1 MLJ 338 ***(cit)***
Pac-Asian Services Pte Ltd v. European Asian Bank AG [1989] 3 MLJ 385 ***(refd)***
Re a Company [1974] 1 All ER 256 ***(foll)***
Re Ban Hong Co Ltd [1959] MLJ 100 ***(cit)***
Re Bryant Investment Co Ltd [1974] 2 All ER 683 ***(cit)***
Re Capital Annuities Ltd [1979] 1 WLR 170 ***(cit)***
Re Carapark Industries Pte Ltd [1967] 86 WN (Pt 1) NSW 165 ***(cit)***
Re Chapel House Colliery Co [1883] 24 ChD 259 ***(refd)***
Re Chemical Plastics Ltd [1951] VLR 136 ***(cit)***
Re Clifoden Benefit Building Society [1868] LR 3 Ch App 462 ***(cit)***
Re Dry Docks Corpn of London [1888] 39 ChD 306 ***(refd)***
Re Globe New Patent Iron Co [1875] 20 Eq 337 ***(refd)***
Re Globe Trust [1915] WN 221 ***(cit)***

Re Great Northern Copper Co [1869] 20 LT 264 ***(cit)***
Re Highfield Commodities Ltd [1984] 3 All ER 884 ***(refd)***
Re Home Assurance Association (No 2)[1871] LR. 12 Eq 112 ***(cit)***
Re International Contract Co ex p Spartali & Tabor [1866] 1 Ch App 523 ***(cit)***
Re Krasnapolsky Restaurant & Winter Gardens Co [1892] 3 Ch 174 ***(cit)***
Re Laceward Ltd [1981] 1 All ER 254 ***(cit)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***
Re London Suburban Bank [1871] 6 Ch App 641 ***(refd)***
Re Lympe Investments Ltd [1972] 2 All ER 385 ***(cit)***
Re Lyric Club [1892] 36 Sol Jo 801 ***(cit)***
Re Media Press Pty Ltd [1980] 4 ACLR 867 ***(cit)***
Re NKM Holdings Sdn Bhd [1985] 2 MLJ 390 ***(refd)***
Re P Turner (Wilsden) Ltd [1987] BCLC 149 ***(refd)***
Re Pac-Asian Services Pte Ltd [1988] 1 MLJ 371 ***(refd)***
Re Roadmakers Pte Ltd [1985] 3 ACLC 591 ***(cit)***
Re Shangri-La Cruise Pte Ltd [1991] 1 MLJ 22 ***(refd)***
Re Sunshine Securities Pte Ltd [1978] 1 MLJ 57 ***(cit)***
Re Swiftcrete Pty Ltd 2 ACLR 411 ***(refd)***
Re Tweeds Garages Ltd [1962] Ch 406 ***(cit)***
Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 ***(foll)***
Re United Iron Mining Co Ltd [1970] 1 MLJ 105 ***(dist)***
Re Vic Groves & Co Ltd [1964] 2 All ER 839 ***(foll)***
Re Western of Canada Oil, Lands & Works Co [1873] LR 17 Eq 1 ***(cit)***
Re Yap Kim Kee & Sons Sdn Bhd [1990] 2 MLJ 108 ***(refd)***
Re Yick Fung Estates Ltd [1986] HKLR 240 ***(cit)***
RS Mohamed Sultan v. Liak Jee Song [1952] MLJ 171 ***(refd)***
Sari Atlantic Sdn Bhd v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 ***(refd)***
Sussex Peerage Claim [1844] 11 CI & F85 ***(cit)***
Teck Yow Brothers Hand-Bay Trading Co. v. Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 ***(refd)***
Ushers Brewery Ltd v. King & Co [1972] Ch 148 ***(cit)***
Warburton v. Loveland [1832] 2 D & C (HL) 480 ***(foll)***
Wei Group Construction Co (Pte) Ltd v. Intraco Ltd [1979] 2 MLJ 4 ***(cit)***
Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd [1994] 3 CLJ 511 ***(refd)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 ***(aff)***

Legislation referred to:

Companies Act 1965, ss. 4, 218(2)(a), (c), 221(2)(e), 226(3), 231, 243, 355
Companies (Winding-up) Rules 1972, rr. 26, 29(2), 35(1), 194
Courts of Judicature Act 1964, s. 43

Companies Act 1948 [UK], s. 238
Companies Act 1967 [UK], s. 68
Companies (Winding-up) Rules 1949 [UK], r. 30

Other source(s) referred to:
Company Precedents, Palmer

For the petitioner - Ong Ban Chai; M/s Ong Ban Chai & Co
For the respondent - Hardip Singh; M/s Gana Muthusamy & Co

Reported by Hjh Siti Faridah Abdul Jabbar

JUDGMENT

Abdul Malik Ishak J:

An *ex parte* application by way of a summons-in-chambers in encl. 5 was filed by the petitioner supported by an affidavit affirmed by Sin Bee Yen (f) on 17 July 1996 and after hearing the submissions of Mr. Ong Ban Chai, the learned counsel for the petitioner, the following orders were made on 24 July 1996 as reflected in encl. 9:

(1) that Mr. Soon Teck Kuan, an approved liquidator, be appointed as provisional liquidator of the respondent company;

(2) that the provisional liquidator do take possession, control and protect the assets or realise the assets of the respondent company and such assets are not to be distributed or parted with until further order;

(3) that the costs of the *ex parte* application be taxed and paid to the petitioner out of the assets of the respondent company.

The respondent through Mr. Hardip Singh of Messrs Gana Muthusamy & Co filed a summons-in-chambers in encl. 13 dated 6 August 1996 supported by an affidavit of Pang Su Hap affirmed on 5 August 1996 as reflected in encl. 12. A notice of motion dated 19 August 1996 was also filed by the respondent in encl. 22 through Mr. Hardip Singh of Messrs Gana Muthusamy & Co and this was accompanied by a certificate of urgency filed by Mr. Hardip Singh on 19 August 1996 as seen in encl. 21. Basically encls. 13 and 22 were meant to counter encl. 5 and both parties magnanimously agreed that these enclosures (referring to encls. 13 and 22) be heard together.

Enclosure 13 sought not only to impugn the order in encl. 9 but it also sought to set aside the winding-up petition dated 18 July 1996. Enclosure 13 too wanted the petitioner to be restrained from presenting any further petition for winding-up the respondent company until the damages are ascertained and paid by the petitioner. The costs of the application by the respondent company in encl. 13 was supposed to be borne by the petitioner. On the other hand, encl. 22 specifically asked for the following prayers:

(a) that the petition for winding-up dated July 17, 1996 presented against the respondent on July 18, 1996 be set aside;

(b) that an injunction be granted to restrain the petitioner and/or their agents or servants from advertising the petition in the newspaper and the gazette;

(c) that the costs of this application be paid by the petitioner to the respondent company;

(d) such further or other relief as this Honourable Court shall deem fit and just.

Mr. Hardip Singh for the respondent was very thorough. He submitted at great length. It was argued that a similar application *vide* companies (winding-up) no: 28-41 of 1996 was filed by the petitioner before another judge where a similar order like that of encl. 9 was made by the judge on 10 June 1996 (exh. P1 of encl. 12). That judge too, it was argued, on 17 July 1996 set aside his own order dated 10 June 1996. I was urged to respond positively to the respondent's applications in encls. 13 and 22 by setting aside my previous order in encl. 9. Sin Bee Yen (f) affirmed an affidavit-in-reply dated 16 August 1996 in encl. 28 and there she deposed that the petition in companies (winding-up) no: 28-41 of 1996 was withdrawn because the statutory notice under s. 218(2)(a) of the Companies Act 1965 ("Act") was not served on the registered office of the respondent. Mr. Hardip Singh relied on the doctrine of *res judicata* and argued that the order in encl. 9 should not have been granted as the final judicial decision was pronounced on the same subject matter by the judge that heard the companies (winding-up) no: 28-41 of 1996. In *New India Assurance Co Ltd v. Karam Singh* [1972] 2 MLJ 26, Gill FJ sitting in the High Court at Muar explained the doctrine of *res judicata* in this way (at p. 28):

> *Res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter (per Lord Romilly in *Jenkins v. Robertson* (1867) L.R. 1 H.L. 117). As I said in *Lee Sim Yoong v. Leong Yoong* (1967) 2 MLJ 86, 88, for the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the Court which heard it. (see also *Chua Wee Seng v. Fazal Mohamed* (1971) 1 MLJ 106).

At the same page in the next paragraph, Gill FJ continued:

> It is common ground that the matter substantially in issue between the parties in the earlier action had not been heard and finally determined by the learned president. Thus, the plea of *res judicata* is not available to the defendant in the present case, so that it cannot be said that the plaintiff cannot in law maintain their present action based on the same subject matter as in the earlier action.

Recently in *Chan Yuow Seng v. Ling Ong Hua* [1995] 2 MLJ 580, I said at p. 584:

> It is apparent that the prayers sought in the Ipoh case are different from that of the Taiping case. The Taiping case sought for the use of reasonable force to gain entry on the land in question; it also sought for mesne profits and twice monthly rentals at the stipulated period with the necessary interest and cost therein. Surely the plea of *res judicata* could not apply as the law to be applied in the Taiping case would be different from the law as applied in the Ipoh case (*RS Mohamed Sultan v. Liak Jee Song* [1952] MLJ 171) and, if I may add, the cause of action and the issues too are totally different (*Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105).
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> I am fully aware that the doctrine of *res judicata* is grounded on the theory that there must be an end to litigation and that this theory is grounded, firstly, on the general interest of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions and, secondly, the right of the individual to be protected from vexatious multiplication of suits by an opponent whose superior wealth, resoures and power may, unless curbed by estoppel, weigh down the judicially declared right of an individual.

That the petitioner withdrew the petition in relation to the companies (winding-up) no: 28-41 of 1996 was not disputed by the respondent – in fact this point was adverted to by Pang Su Yap at para. 6 of his affidavit in encl. 12. This clearly showed that the matter was not adjudicated upon and there was no finality at all. In my judgment, the doctrine of *res judicata,* in the circumstances, cannot be invoked by the respondent. As was held by Poh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 that (see the headnote) "Where a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the *res judicata*, as the judgment becomes the truth between the parties. An *estoppel per rem judicatum* has been created as a result." Malek Ahmad J (now JCA) in *Bank Bumiputra Malaysia Berhad v. Azlan bin Hashim* [1994] 3 CLJ 602 held the view that since "the plaintiff's claim had been fully litigated as against the defendant and it cannot therefore be raised again on the principles of estoppel and *res judicata."* On the facts, though *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd (supra)* and Bank *Bumiputra Malaysia Berhad v. Azlan bin Hashim (supra)* are poles apart from the present case, yet the principles enunciated in these cases are germane and it should be vigorously applied to the present case. It is beyond comprehension if one were to hold onto the notion that the withdrawal of the petition for want of technicality under s. 218 (2)(a) of the Act constitutes adjudication of the whole matter – thus raising the doctrine of *res judicata* in favour of the respondent. As I said there was no finality of

the subject matter before the judge in companies (winding-up) no: 28-41 of 1996 and, consequently, it was wishful thinking on Mr. Hardip Singh's part to submit on the doctrine of *res judicata*.

An argument was advanced to the effect that the petitioner must obtain a winding-up order before the appointment of a provisional liquidator. This argument was presented in such a way as to show that Mr. Ong Ban Chai, the learned counsel for petitioner, had orchestrated the whole matter for the benefit of the petitioner. The answer is not far to seek, it is found in s. 231 of the Act which enacts that:

> The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

It is clear from s. 231 of the Act that this court may appoint Mr. Soon Teck Kuan, an approved liquidator, as a provisional liquidator after the filing of the petition on 18 July 1996, though it was dated 17 July 1996, as reflected in encl. 2 but before the making of a winding-up order. The purpose of appointing Mr. Soon Teck Kuan as a provisional liquidator before the making of a winding-up order is quite obvious – it is to enable the provisional liquidator to take possession, control and protect the company's assets. In the context of the present case, it is also meant to realise the assets of the respondent company and such assets are not to be distributed or parted with until further order. *Re a Company* [1974] 1 All ER 256; [1973] 1 WLR 1566 lays down the principle, which I fully subscribe, to the effect that the appointment of a provisional liquidator may be made only when an effective petition (like the petition in encl. 2 of the present case) is pending. One must not forget that the appointment of Mr. Soon Teck Kuan as a provisional liquidator is not only povisional but it is also contingent in the sense that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding-up being made, and if no such order is made, then the appointment ought not to interfere with the rights of third parties: *Re Dry Docks Corpn of London* [1888] 39 Ch D 306 at p. 314 per Fry LJ. Generally speaking, although the court would be slow to appoint a provisional liquidator unless there is a good *prima facie* evidence that the company would be wound up, it must be emphasised that the court's power to make such an appointment is not restricted to circumstances where the company is obviously insolvent, or that the company would be wound up, or that the company's assets are in jeopardy: *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105; [1972] 1 WLR 640; and *Re Highfield Commodities Ltd* [1984] 3 All

ER 884; [1985] 1 WLR 149. Thus, the Court of Appeal in *Re P Turner (Wilsden) Ltd* [1987] BCLC 149 appointed a provisional liquidator where a liquidator of two associated companies had conflict of interest.

In *Re Union Accident Insurance Co Ltd (supra),* Plowman J had to consider a motion by the *Union Accident Insurance Co Ltd* for (1) an order discharging the appointment of the official receiver as the provisional liquidator of the company under an order made on 22 November 1971, on an *ex parte* application by the Department of Trade and Industry ("the department"), and continued over the adjourned hearing of the summons on 30 November 1971 and (2) an order discharging the appointment of Gerhard Adolph Weiss as special manager of the company under an order made *ex parte* on 23 November 1971, or alternatively, (3) an injunction restraining the official receiver from acting whether by himself, his servants, agents or howsoever otherwise than in accordance with the terms of the order, and (4) an injunction restraining the special manager from carrying on the business of the company otherwise than with a view to the preservation of its assets including goodwill until the hearing of the petition, presented by the department, for the winding-up of the company. His Lordship Plowman J held, *inter alia*, that the power to appoint a provisional liquidator conferred on the court by s. 238 of the English Companies Act 1948 (equivalent to our s. 231 of the Act) was not limited to cases where such special circumstances existed; other factors, such as the public interest, might be taken into account; in the present case the public interest required that the solvency of the company should be maintained or the company wound up before its liabilities exceeded its assets; that solvency depended to an important extent on the company recovering from its brokers and agents the balances which they held; the evidence showed that it was essential that continous pressure should be maintained on such agents to remit the sums to the company; the appointment of a provisional liquidator, clothed with the necessary authority to collect those assets, was in the circumstances necessary; accordingly no order would be made discharging his appointment or that of the special manager. Plowman J refused to grant the injunctions for the following reasons:

(i) the provisional liquidator was acting within the powers conferred on him in allowing the branch office to be closed and the staff dismissed;

(ii) it was the duty of the provisional liquidator to protect the company's assets; the reduction of the company's liabilities was a correlative of the protection of its assets; on the evidence the usefulness of the branch office had gone once new insurance business or the renewal of existing policies of insurance was forbidden under s. 68 of the Companies Act 1967, and the office had become unprofitable; accordingly the closure of the Bradford office was a sensible and proper step for the special manager, with the concurrence of the provisional liquidator, to take.

In *Re Highfield Commodities Ltd (supra),* Sir Robert Megarry VC said [1984] 3 All ER 884 especially at p. 893 at para. b to c) in reference to s. 238 of the English Companies Act 1948 (which is equivalent to our s. 231 of the Act):

> The section confers on the Court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences.

I was extremely cautious in appointing Mr. Soon Teck Kuan as a provisional liquidator as an exercise of this nature might appear, at first blush, to prejudge the issue of winding-up and disrupt the respondent company's business: *Re Clifoden Benefit Building Society* [1868] LR 3 Ch. App 462. But, at the same time, I was always aware that an appointment of a provisional liquidator does not necessarily imply that a winding-up order will be made in the final analysis because the provisional liquidator's function is simply to maintain the *status quo,* preserve the assets and prevent prejudice to the contesting parties: *Re Carapark Industries Pte Ltd* [1967] 86 WN (Pt. 1) NSW 165. Of course, as I said earlier, the petitioner must show a good *prima facie* case before a provisional liquidator can be appointed (*Re Roadmakers Pte Ltd* [1985] 3 ACLC 591; *Re Yick Fung Estates Ltd* [1986] HKLR 240). In my judgment, the petitioner here has proven a good *prima facie* case and the next step they have to do is to adduce other evidence to justify this court in exercising its wide discretion to appoint a provisional liquidator in the person of Mr. Soon Teck Kuan. In the present case, there were fears that the assets of the respondent's company would likely to be dissipated. The nagging fear was that the machines might be shipped to Sri Lanka leaving the petitioner and other creditors high and dry.

Next, it was argued that when the companies (winding-up) no: 28-41 of 1996 was withdrawn before the other judge, a fresh winding-up petition, like the present one before me, can only be filed with leave of the court. The case of *Re United Iron Mining Co. Ltd* [1970] 1 MLJ 105 was cited for the proposition that there must be leave for the applicant to withdraw his petition and leave to file, if so required, a fresh petition. A passage from the judgment of LC Vohrah J in *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423 especially at p. 424 was cited to drive home the point that leave was essential before a fresh petition was filed and that passage reads as follows:

> Notice of change of solicitors was filed on 26 November 1987 and notice of discontinuance was filed two days later on 28 November by the new solicitors Messrs Ong Ban Chai & Co without leave of the court contrary to the provisions of Order 21 r. 2 (1) (presumably this must refer to the Rules of the High Court, 1980).

Another passage from the judgment of VC George J (as he then was) in *Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ 493 especially at p. 495 was relied upon and that passage reads as follows:

> When the petition was called on for hearing on the 9 September 1985 and before encl. (10) was considered, counsel for the petitioners sought and obtained the leave of the court to withdraw the petition with liberty to file afresh. The petition was struck off with liberty to the petitioners to file afresh.

In the same vein, *Bank Bumiputra Malaysia Berhad v. Azlan bin Hashim (supra)* was also cited and relied upon for the same proposition. With respect, all these cases did not consider s. 221(2)(e) of the Act before arriving at the conclusions that leave was required to withdraw and to file a fresh petition. That section reads as follows:

> 221 (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition -
>
> (e) allow the petition to be amended or withdrawn.

It is plain from the reading of s. 221(2)(e) of the Act that the issue of leave is purposely left out and that being the case, I am constrained to hold that there was no necessity for the petitioner to obtain the leave of the court before filing the fresh petition. The cardinal rule is this: the construction of Acts of Parliament should be construed according to the intention expressed in the Acts themselves. Thus, the function of the court is simply to interpret an Act "according to the intent of them that made it" and that intention can only be deduced from the language used (Lord Parker CJ in *Capper v. Baldwin* [1965] 2 QB 53, 61). In the same vein, Donaldson J in *Corocraft v. Pan-Am* [1969] 1 QB 616, 638 said that "the duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments." In my judgment, the words employed in s. 221(2)(e) of the Act are themselves precise and unambiguous and those words must necessarily be expounded in their ordinary and natural sense. There was thus no necessity for leave to be given before filing the fresh petition. As Tindal CJ said in *Warburton v. Loveland* [1832] 2 D & C (HL) 480, 489:

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

Mr. Hardip Singh launched a concerted attack at the failure of the petitioner, in an *ex parte* application, to give an undertaking as to damages. In *Re Highfield Commodities Ltd* [1984] 3 All ER 844 an undertaking as to damages was not required as the applicant there was the Crown. Here, the petitioner

was only a company and it was stressed that there should be an undertaking as to damages for the appointment of a provisional liquidator. Sir Robert Megarry V.C. in delivering the judgment of the Chancery Division in *Re Highfield Commodities Ltd (supra)* referred to Palmer's Company Precedents to draw the necessary principles governing undertakings as to damages. This was what his Lordship said:

> Palmer's *Company Precedents* (17th edition, 1960) volume 2, page 104 sets out two forms of an order appointing a provisional liquidator after the presentation of a winding-up petition and before a winding-up order has been made. One form does not contain any undertaking in damages by the applicant, whereas the other does, but qualifies it by a note that the undertaking 'is not usually required if the company appears'.

Further down the page, Sir Robert Megarry V.C. continued in these words after referring to *F. Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry* [1974] 2 All ER 1128; [1975] AC 295:

> I accept, of course, that there are many distinctions between the grant of an interlocutory injunction and obtaining the appointment of a provisional liquidator. Nevertheless, the *Hoffmann* case seems to me to provide a useful parallel as regards the special position of the Crown. In relation to the present case, the position both on the general law and on the special position of the Secretary of State seems to me to be as follows. First, the general practice is to require an undertaking in damages if a provisional liquidator is appointed *ex parte*. Second, the general practice is not to require an undertaking in damages if the appointment is made *inter partes*. The distinction, I think, or a distinction, must be that the protection of the undertaking will be given where the company has had no opportunity of providing any answer or explanation to contentions which may prove to be wholly unfounded, whereas if the company has at least had the opportunity of being heard, the Court will be making the appointment after considering what the company has said, if it has chosen to speak, and so can better assess the propriety of making the appointment.

It is interesting to note that in the case of *Pac-Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385, the order of the court there contained the "usual undertaking" that the applicant "abide by any order the court or a judge may make as to damages in case the court or a judge shall hereafter be of opinion that the abovenamed company shall have sustained any by reason of this order which the petitioner ought to pay." Wee Chong Jin CJ writing for the Court of Appeal in *Pac-Asian Services Pte Ltd v. European Asian Bank AG (supra)* considered *Ushers Brewery Ltd v. King & Co* [1972] Ch. 148 and *Art Trend Ltd v. Blue Dolphin (Pte) Ltd* [1983] 1 CLJ 342; [1983] 2 MLJ 93 where the courts there considered the inquiries as to damages that arose from undertakings given to support interlocutory injunctions where the

injunctions ought not to have been granted. Flowing from these cases, the crucial question to ask is this: must the petitioner, in the present case, give an undertaking as to damages in an *ex parte* application for the appointment of a provisional liquidator? All the cases which have been referred to in this judgment do not bar nor prevent this court from hearing an *ex parte* application for the appointment of a provisional liquidator, like the present case, and, consequently, give an order to that effect even though the petitioner do not give an undertaking as to damages. Section 231 of the Act do not lay down the requirement that there must be an undertaking as to damages before the appointment of a provisional liquidator. It is entirely up to the court to specify whether the petitioner should give an undertaking as to damages. I am fortified in my view by the words "subject to such limitations and restrictions as ... the court may specify in the order appointing him" that appear in s. 231 of the Act. In my judgment, the appointment of Mr. Soon Teck Kuan as a provisional liquidator do not bar nor prevent the respondent from setting it aside at a later date as they now do in encl. 13. In the event the respondent is successful in their encl. 13 summons-in-chambers to set aside the order as reflected in encl. 9, this court would then give an order as to damages and costs to be assessed. Concisely put, orders as to damages and costs would, at once, be made when the appointment of provisional liquidators have been discharged: *Re Pac-Asian Services Pte Ltd* [1988] 1 MLJ 371. Incidentally, r. 35(1) of the Companies (Winding-up) Rules 1972 are couched in precise and unambiguous words to the effect that:

> At any time after the presentation of a petition, the court may, upon the application of any creditor or contributory of the company and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator make the appointment upon such terms as the court shall think just or necessary.

And these words by themselves declare the intention of the Rules Committee and effect must be given to it no matter how distasteful the consequences are (*Sussex Peerage Claim* [1844] 11 CI & F.85, 143). By r. 35(1) of the Companies (Winding-up) Rules 1972, the court will grant "the appointment of a provisional liquidator ... upon such terms as the court shall think just or necessary" without the need for the petitioner creditor to give an undertaking as to damages. Any argument to the contrary in the face of the clear words in r. 35 (1) of the Companies (Winding-up) Rules 1972 must surely be rejected outright as untenable.

A crucial point was raised by Mr. Hardip Singh. This was in regard to the statutory notice under s. 218 (2)(a) of the Act. It was argued that the demand was not served on the respondent's registered office and this was said to be a defect that went to the very root of s. 218 (2)(a) of the Act. Such defect was said to be incurable. Now, the question to ask is this: What was the

registered office of the respondent? To answer that question, it is ideal to set out the events in chronological order:

(1) On 4 April 1996, the Malaysian Registrar of Companies by letter informed Messrs Ong Ban Chai & Co., as solicitors for the petitioner, the registered office of the respondent as at Suite No: 1108, 11th Floor, Merlin Tower, Johor Baharu (see encl. 28, exh. "SBY 3").

(2) Messrs Ong Ban Chai & Co., as solicitors for the petitioner, issued a notice dated 15 May 1996 under s. 218 of the Act to the respondent at Suite No: 1108, 11th Floor, Merlin Tower, Johor Baharu. That notice specified not only the sum outstanding as S$35,554 but it also stipulated twenty one (21) days' grace period for the respondent to pay that sum to the reasonable satisfaction of the petitioner (see encl. 4 of exh. "SBY 2" and encl. 2 of exh. "R1").

(3) The respondent lodged a notice of change of its registered office with the Malaysian Registrar of Companies dated 1 March 1996 in Form 44 which showed the respondent's new registered office as at No: 8M, Mezzanine Floor, (Susur 3), Jalan Larkin, 80200 Johor Baharu, Johor. The new registered office was said to be with effect from 1 March 1996 (see encl. 12 exh. "P2" especially exh. "P1" enclosed therein and encl. 30 exh. "D5" thereof).

(4) Sin Bee Yen (f) affirmed an affidavit verifying petition on 18 July 1996 and there she enclosed a statutory declaration by Mohd. Razak bin Ahmad subscribed and solemnly declared on 8 July 1996 to the effect that the notice under s. 218 (2)(a) of the Act was served on the registered address of the respondent at Suite No: 1108, 11th Floor, Merlin Tower, 80000 Johor Baharu on 17 May 1996 at 3.15pm by way of personal service by leaving the notice at the respondent's registered office as aforesaid (see encl. 6 exh. "SBY 1").

(5) The petitioner played safe by serving the petition to the respondent's new address at No: 8M, Mezzanine Floor, (Susur 3), Jalan Larkin, 80200 Johor Bahru on 26 September 1996 at about 5.05pm. This fact was amply set out in the Affidavit of service of petition on the respondent's company affirmed by Ahmad bin Abdul Majid dated 1 October 1996 (see encl. 39).

It was argued that the same notice under s. 218 (2)(a) of the Act was utilised by Messrs Ong Ban Chai & Co for the companies (winding-up) no: 28-41 of 1996 and for the petition before me. Flowing from this it was argued that what was bad service in the companies (winding-up) no: 28-41 of 1996 must equally be held to be bad before me. As I said in the early part of this judgment, the petitioner withdrew their petition in the companies (winding-up) no: 28-41 of 1996 without adjudication by the court.

The law on statutory notice under s. 218 (2)(a) of the Act has developed tremendously. By way of a preliminary observation it is germane to state that judges have adopted different approaches when faced with the issue of statutory notice under s. 218 (2)(a) of the Act. For instance, Malek Ahmad J (now JCA) in *Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511; [1994] 2 MLJ 266, 271 was of the view that an adequate proof of physical delivery of the demand to the company's registered office must be placed before the court even though the letter of demand had been sent by registered post to the registered office of the company. Zakaria Yatim J (now FCJ) in *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108, 111 was of the view that in order to raise the presumption of insolvency, there must be strict compliance with the statutory requirements. Abu Mansor J (now JCA) adopted a less strict and flexible approach in *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292; [1990] 2 MLJ 46 and there his Lordship held the view that minor irregularities in the statutory demand could be waived since the real issue was whether the company was able to pay its debts and on the evidence the company was held to be insolvent. In *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 MLJ 313, the court held that a mistake in the statutory demand regarding the time available for the debtor to pay was declared not to be fatal.

Now, as I said earlier the petition was dated 17 July 1996 and it was filed on 18 July 1996. After Messrs Ong Ban Chai & Co had ascertained the registered office of the respondent on 4 April 1996, the statutory notice of demand dated 15 May 1996 was served on the respondent at Suite No: 1108, 11th Floor, Merlin Tower, 80000 Johor Baharu on 8 July 1996. The petitioner cannot be blamed for they had acted prudently when they enquired and was told by letter dated 4 April 1996 from the Registrar of Companies that the respondent's registered office was at the aforesaid address. Thus, when the respondent lodged a change of registered office with the Registrar of Companies by filing form 44 dated 1 March 1996 the petitioner cannot be blamed for not knowing that new change of registered office.

In *Re Shangri-La Cruise Pte Ltd* [1991] 1 MLJ 22 it was held that if the notice was served at the registered office, it was considered good service even if the company has actually moved without informing the Registry of Companies. It is interesting to note that in *Re Shangri-La Cruise Pte Ltd (supra),* the statutory demand was served at the registered office of the company before the company lodged notice of change with the Registrar. Here, in the present case the statutory demand was served at the registered office of the respondent on 8 July 1996 after the respondent had lodged a notice of change with the Registrar on 1 March 1996. But the mistake, in the present case, must surely be put on the shoulders of the Registrar of Companies for its lackadaisical attitude when the information was relayed to Messrs Ong Ban

Chai & Co., on 4 April 1996 that the respondent's registered office was at Suite No: 1108, 11th Floor, Merlin Tower, 80000 Johor Bahru. By 4 April 1996 the Registrar of Companies should know of the new address of the respondent's registered office as at No: 8M, Mezzanine Floor, (Susur 3), Jalan Larkin, 80200 Johor Bahru. In my judgment, defective service of the statutory demand was curable by s. 355 of the Act and by r. 194 of the Companies (Winding-up) Rules, 1972. Irregularities were also held to be curable in *Sari Atlantic Sdn Bhd v. Aik Kim Enterprise* [1988] 1 MLJ 201; *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390; and *Cymun Development Sdn Bhd v. Supermax Sdn Bhd* [1996] 1 CLJ 545. The petitioner, in the present case, was totally blameless in so far as the service of the statutory notice was concerned. The blame should fall on the Registrar of Companies. The present case can certainly be distinguished from *Re Swiftcrete Pty Ltd* 2 ACLR 411 which was decided by Needham J on 17 February 1977. The facts in that case may be briefly stated as follows. On 22 January 1976 a company lodged the appropriate form with the Corporate Affairs Commission notifying a change of registered office. This form was never registered. Subsequently, the company filed an annual return showing its new office as its registered office. A creditor searched in the registry and found the former registered office and served a s. 222 (of the Companies Act) demand and subsequently a petition at the former registered office. When there was no appearance for the company the court made a winding-up order. The company became aware of the proceedings when the liquidator made contact with the directors and applied by summons to set aside the winding-up order. It was held that as the change of office was indicated to the public on the annual return filed in the registry, the petition had not not been properly served. Accordingly, the order for winding-up, not having been entered, should be set aside. In the present case before me there was not a shred of evidence to show that the respondent had filed their annual return showing their new office as its registered office available to the members of the public at large like what transpired in *Re Swiftcrete Pty Ltd*. The petitioner here was totally blameless.

Next, it was argued that Sin Bee Yen (f) who affirmed the several affidavits on behalf of the petitioner was not a "director, secretary or other principal officer" as envisaged under r. 26 of the Companies (Winding-up) Rules 1972. She was merely the sales manageress of the petitioner company. The list of directors and secretaries of the respondent company from the Singapore's Registry of Companies and Businesses in encls. 36 and 38 do not bear the name of Sin Bee Yen (f). It was said that the sales manageress was not the principal officer of the petitioner's company. In *Re Vic Groves & Co Ltd* [1964] 2 All ER 839, the affidavit in support of the winding-up petition was sworn by Mr. Mark Mothio whose position in Shell-Mex and B.P. Ltd was that of a divisional manager. The petitioner had given Mr. Mark Mothio a

power of attorney empowering him, among other things, to present winding-up petitions and swear affidavits on the petitioner's behalf. The question in issue before the court was whether Mr. Mark Mothio had affirmed a proper affidavit in support of the petition. Pennycuick J in a short judgment had this to say:

> I do not want to say that there can never be a case in which a company could properly support its petition by an affidavit sworn by some person appointed as an attorney other than a director, secretary or other principal officer. I think, however, that it is only in exceptional circumstances that that course should be taken. It may be appropriate where the petitioner is a company not carrying on business in this country. The rule, although stated to be merely directory, does require in express terms that in the case of a corporation the petition should be verified by an affidavit sworn by 'a director, secretary or other principal officer thereof', and I think that it is better to keep to the literal terms of the rule unless there are special circumstances making a departure from the terms of the rule desirable.

It seems to me that Pennycuick J was not prepared to accept Mr. Mark Mothio who held the position of divisional manager as a principal officer under r. 30 of the English Companies (Winding-up) Rules 1949 (in *pari materia* with our r. 26 of the Companies (Winding-up) Rules (1972) but nevertheless his Lordship was prepared to make a winding-up order subject to the production of an affidavit sworn by a director or secretary or a principal officer. Pennycuick J in his judgment continued in these words:

> His position is that of divisional manager. I have been told that there are, in all, thirty-two divisional managers. By section 455 of the Companies Act 1948, the expression 'officer', in relation to a body corporate, includes a manager, so it seems clear that Mr. Mothio is an officer of the petitioner company, but on the material before me it seems impossible to say that he is a principal officer of the company. That expression is not necessarily limited to directors. Various other officials of corporations have from time to time been accepted as principal officer. For example, I imagine, a general manager would be, but I do not find it possible to say that all these thirty-two gentlemen are principal officers of the company.

Further down the same page, Pennycuick J said:

> It would be highly undesirable that the Companies (Winding-up) Department should in every case, where the petition is verified by an affidavit by some person other than a director or secretary or somebody who is obviously a principal officer, be put to the task of entering into an inquiry whether the given individual to or is not a principal officer of the company. So it seems to me that unless there is any more to it, I must treat Mr. Mothio as not being a principal officer of the petitioner company and, accordingly, his affidavit is not one which complies with rule 30.

Finally, in the final paragraph of his judgment, Pennycuick J said:

> In the circumstances, I will take what is the usual course in cases of this kind, that is, to make a winding-up order subject to the production of an affidavit sworn by a director or secretary or a principal officer.

The term "principal officer" is not defined in the Act. But the word "officer" is defined in s. 4 of the Act to include (the relevant part only):

> (a) any director, secretary or employee of the corporation.

I am prepared, in the circumstances, unlike Pennycuick J. in *Re Vic Groves (supra)* to hold that Sin Bee Yee (f) as an employee of the petitioner company to be the principal officer capable of and competent to verify the several affidavits filed in the present case.

My attention was drawn to the case of *Chin Yoon Timber Co. v. Overseas Lumber Bhd* [1978] 2 MLJ 173 which, with respect, was not relevant to the issue of a principal officer verifying an affidavit because that case decided that: "The underlying general principal governing an affidavit is that it must be made in some cause or matter which is actually pending in the court" per Syed Othman J. *Chin Yoon Timber (supra)* revolved on a different set of facts. There the petitioner presented a petition to wind-up the respondent company on 17 May 1977. The affidavit verifying the petition was sworn before the presentation of the petition. The respondent objected to the petition and the court allowed an adjournment. Thereafter, the petitioner took the opportunity of that adjournment and filed another affidavit verifying the petition which was sworn on 12 March 1978. Since there was a total disregard for the rules the petition was struck out but with liberty to file afresh. It must be emphasised that r. 26 of the Companies (Winding-up) Rules, 1972 requires an affidavit verifying the petition to be sworn after the presentation is presented. Thus, it was not surprising that the court in *Lim Tok Chiow v. Dian Tong Credit & Development Sdn Bhd* [1994] 4 CLJ 155; [1994] 2 MLJ 345 held that swearing the affidavit before presentation of the petition was fatal, and the petition was struck out.

Undaunted, it was next argued that the affidavit in support of the application to appoint the provisional liquidator was inaccurate and contained material non-disclosure. There was a failure, it was said, to disclose that the same notice of demand under s. 218 (2)(a) of the Act was used in the present case as was used in the companies (winding-up) no: 28-41 of 1996. The journals are replete with cases on this point. Suffice for this exercise that a few of them will be referred to. In *Pac-Asian Services Pte Ltd (supra)*, it was held that before the court will appoint a provisional liquidator, the petitioning creditor must show that there is a good *prima facie* case for winding-up and must also

adduce evidence to show that it is right in the circumstances of the case that provisional liquidators be appointed. On the facts the court there held the view that the affidavit in support of the application to appoint provisional liquidators was inaccurate and contained material non-disclosure. In *Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Pelikuidasi) Chi Liung & Sons Sdn Bhd (Dalam Penggulungan)* [1996] 3 CLJ 86; [1996] 2 AMR 1682, the court ordered the removal of a liquidator and replaced it with a fresh one when the defendant failed to make full and frank disclosure of all the facts to the court. In *Re Lo Siong Fong* [1994] 2 MLJ 72 the court ordered the setting aside the appointment of the provisional liquidator and also ordered a permanent stay of the petition because there were material non-disclosures. The pertinent question to ask is this. Was there indeed a material non-disclosure as alleged? Para. 4 of encl. 4 adverted to the statutory notice of demand and it enclosed that notice as an exhibit for the perusal of the respondent. The statutory notice of demand as exhibited in "SBY 2" was very clearly worded. It showed the registered office of the respondent. It showed the specified debt which was presently due (*Re Bryant Investment Co Ltd* [1974] 2 All ER 683). It was dated and signed by an authorised agent, in the present case by Messrs Ong Ban Chai & Co. It stipulated that the respondent must pay the debt within 21 days from the date of the service of the demand and failing which the respondent will be deemed unable to pay its debt and action will be taken to wind-up the company. The next question to ask would be this: Was it necessary for the petitioner to reveal that they used the same statutory notice of demand as was used in the companies (winding-up) no: 28-41 of 1996? It will be recalled that the companies (winding-up) no: 28-41 of 1996 was an entirely different exercise from the present case. The present case constitutes a fresh petition and there is no prohibition either in the Act or in the Companies (Winding-up) Rules, 1972 for the petitioner to utilise the same statutory notice of demand as was used in the companies (winding-up) no: 28-41 of 1996 provided all the requirements of s. 218(2)(a) of the Act have been fulfilled. That being so, in my judgment the answer to the question posed would be in the negative. The petitioner did reveal in encl. 4, para. 5.1. of the existence of the previous companies (winding-up) petition that was withdrawn on 17 July 1996 without stating the particulars of the statutory notice used for that abortive petition. If at all there was a non-disclosure, it was not on a material point and it was not as bad as *Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Pelikuidasi) Chi Liung & Sons Sdn Bhd (Dalam Penggulungan) (supra).* It is more of an irregularity that can be cured and certainly curable under s. 355 of the Act and by r. 194 of the Companies (Winding-up) Rules, 1972.

Mr. Ong Ban Chai, the learned counsel for the petitioner, confined his arguments on two main issues the first was the question of the respondent's insolvency and, the second, was in regard to the crucial question of whether there was a *bona fide* dispute as to the respondent's debt to all the creditors.

Three creditors through their respective solicitors have filed their notices of intention to appear on the petition. In chronological order these three creditors can be listed as follows:

(1) Jumaya Industries Sdn Bhd filed their notice of intention to appear dated 1 August 1996 through Messrs Leng & Co., for the sum of RM48,602.50 together with an interest of 8% per annum from 25 June 1995 until the date of payment or realisation and costs of RM1,110 (see encl. 24).

(2) Ban Hin Lee Bank Berhad through Messrs Leng & Co., filed their notice of intention to appear dated 2 August 1996 for the following sums (see encl. 17):

(a) RM407,970.42 due under the overdraft facility;

(b) interest on RM400,000 at 10.9% per annum and interest on RM7,970.42 at 12.9% per annum from 1 May 1996 until the date of payment or realisation;

(c) RM1,196,420.22 due under the foreign bills of exchange purchased;

(d) interest on RM1,196,420.22 at 7.5% per annum from 1 May 1996 until the date of payment or realisation;

(e) RM36,000.00 due under the bankers guarantee;

(f) RM191,155.72 due under the term loan; and

(g) interest on RM191,155.72 at 10.90% per annum with monthly rests and penalty interest at 11.90% on the arrears of instalments of RM48,685.09 from 1 May 1996 until the date of payment or realisation.

(3) Titan Polyethylene (Malaysia) Sdn. Bhd through Messrs Paul Tan Looi & Associates dated 31 October 1996 for the sum of RM505,302.58 (see encl. 42).

Ban Hin Lee Bank Berhad by summons-in-chambers in encl. 44 supported by an affidavit affirmed by Roslan bin Mansor on 20 September 1996 in encl. 43 sought leave to intervene and be added as an intervenor in the petition. By virtue of s. 226 (3) of the Act, Ban Hin Lee Bank Berhad also sought leave to:

(a) continue and proceed with the civil suit no: 22-142 of 1996 for the recovery of the outstanding sums due and owing;

(b) institute and commence foreclosure proceedings against the respondent for the sale of all those two charged properties held under HS(D) 6459 for TLO 6077 and HS(D) 6460 for TLO 6078, both in the township of Johor Bahru for recovery of the outstanding sums due and owing under six legal charges created over those two charged properties by the respondent in favour of Ban Hin Lee Bank Berhad;

(c) costs;

(d) such further or other relief as this Honourable Court shall deem fit and proper.

On 20 November 1996, encl. 44 was heard by me. Both the petitioner and the respondent agreed to the prayers that were sought for in encl. 44 and, consequently, orders to that effect were made with costs in the cause.

Miss Mary Ong, the learned counsel for one of the supporting creditors, namely: Schenker Malaysia Sdn Bhd, informed the court at the bar that a judgment was obtained by Schenker Malaysia Sdn Bhd against the respondent on 3 May 1996 for the sum of RM12,634.32. Mr. Hardip Singh did not challenge this assertion.

Sin Bee Yen (f) affirmed an affidavit-in-reply dated 28 August 1996 in encl. 34 and there she deposed and enclosed a consent judgment before the Sessions Court at Shah Alam dated 4 December 1995 where the respondent agreed to pay Juhalim Biotech Sdn Bhd a sum of RM37,220 with interest at 8% per annum from 29 May 1995 payable in six monthly instalments beginning from 15 December 1995 till the full sum has been paid. Cost was itemised at RM750. It was also part of the consent judgment that in the event the respondent defaulted in paying any of the instalment sum, the balance then due must be paid forthwith.

Reliance was placed by Mr. Ong Ban Chai in regard to the companies (winding-up) no: 28-41 of 1996 where the respondent had through their solicitors Messrs S.K. Song by letter dated 12 June 1996 (see encl. 4, para. 5.1., exh. "SBY 3") admitted the debt and proposed to pay by instalments. This was a damning piece of evidence which weighed heavily against the respondent. The then Supreme Court in the case of *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 2 MLJ 447, held that where the company admitted that it owed a substantial part but not all of the debt claimed, the presumption of insolvency arose upon neglect to pay the admitted sum. The petitioner in the present case could rely either

on the statutory presumption of insolvency under s. 218(2)(a) of the Act or in addition to that the petitioner could resort to s. 218(2)(c) of the Act to prove the insolvency of the respondent in some other way. This was indeed permissible: *Weng Wah Construction Co. Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511; [1994] 2 MLJ 266. The consent judgment recorded before the Shah Alam Sessions Court clearly showed the depth of the respondent's insolvency. It must be emphasised that insolvency can be established on evidence and not merely on account of non-compliance with a statutory demand as reflected in the case of *Teck Yow Brothers Hand-Bay Trading Co. v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 1 MLJ 101. In my judgment, the petitioner has successfully set out the facts necessary to support their contention that the respondent was insolvent: *Pan Asian Services Pte Ltd v. European Asian Bank (supra)*; *Re Media Press Pty Ltd* [1980] 4 ACLR 867.

Mr. Pang Su Hap affirmed an affidavit-in-reply dated 29 August 1996 in encl. 36A and there he deposed that the respondent company was solvent and had assets worth more than RM5 million. There was also, as deposed by Mr. Pang Su Hap, an impending mortgage loan of RM2.5 million. Indeed if it was true that the respondent was worth that much, how could they not pay the debt owed to Schenker Malaysia Sdn Bhd in the sum of RM12,634.32? How could the respondent agree to enter a consent judgment with Juhalim Biotech Sdn Bhd for the sum of RM37,220? The list of the parties intending to appear at the petition as handed to the court by Mr. Ong Ban Chai under r. 29 (2) of the Companies (Winding-up) Rules 1972 revealed a debt of RM7,787.86 to Solid Packaging Industry Sdn Bhd, a debt of RM135,276.30 to Tenaga Nasional Berhad and a debt of RM65,197.31 together with interest to Martogg Singapore Pte Ltd. This is not a case where the petitioner petitions to enforce a disputed debt. This is not the case where the petitioner is abusing the process of the court and where the court will dismiss the petition with costs as envisaged in *Re Ban Hong Co. Ltd* [1959] MLJ 100. This is not the case where a winding-up petition is not an appropriate means of collecting a disputed debt as envisaged in *Re Lympe Investments Ltd* [1972] 2 All ER 385. This is also not the case where the petitioner applied improper pressure to bear on the respondent to pay the debt and neither is this the case where the best course of action would be to have the matter adjudicated upon by way of an action for debt: *Re Laceward Ltd* [1981] 1 All ER 254. There is evidence in this case of debt owing not only to the petitioner but to other creditors and there was also evidence of the respondent's failure to pay the electricity bill to Tenaga Nasional Berhad. There is also evidence that the machines may eventually be shipped to Sri Lanka. All these show that there was no *bona fide* dispute about the debt and, consequently, there was no need to stay the petition pending the resolution of the dispute as envisaged in *Ng Tai Tuan v. Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338.

I am constrained to apply the test of commercial insolvency as propounded by a string of authorities. The test is this: Whether the respondent company is able to meet its current debts as they fall due? It is said that a company may still be insolvent even if it has substantial assets especially when those assets cannot be immediately realised to pay current debts. This is the dilemma in which the respondent company has found themselves in. It is also said that this test of commercial insolvency is extended to a level where the company even though on liquidation may have assets sufficient to discharge all its liabilities: *Re Sunshine Securities Pte Ltd* [1978] 1 MLJ 57; *Wei Group Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 and *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21.

On the available evidence before me, it is my judgment that the respondent was insolvent as they were not able to pay current debts. It is also my judgment that there was no *bona fide* dispute as to the debt incurred by the respondent. For the reasons adumbrated above, I had no choice but to dismiss both encls. 13 and 22 with costs.

On 20 November 1996, I heard submissions from both parties in regard to the respondent's application for a stay of the whole proceedings as reflected in encl. 48.

Section 243 of the Act enacts as follows:

(1) At any time after an order for winding-up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

(2) On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

(3) An office copy of every order made under this section shall be lodged by the company with the Registrar and with the Official Receiver within fourteen days after the making of the order.

It is crystal clear that an application for a stay under s. 243 of the Act may be entertained after the court has made an order for winding-up. Here, an order for winding-up has yet to be made by me and on this ground alone the application for the stay in encl. 48 should be dismissed with costs. It seems to me that the application for a stay of the whole proceedings is premature.

Section 43 of the Courts of Judicature Act, 1964 enacts that: "Wherever application may be made either to the High Court or to the (Court of Appeal), it shall be made in the first instance to the High Court." It is pertinent to note that the words 'Court of Appeal' within square brackets were amended by the Courts of Judicature (Amendment) Act 1994 (Act A886). In my judgment, s. 43 of the Courts of Judicature Act 1964 must be read together with s. 243 of the Act. The respondent is not precluded from filing encl. 48 but whether that application is successful is another story entirely. Mr. Hardip Singh says that he wants a stay of encl. 2 completely and for that reason he says s. 243 of the Act does not apply. I beg to differ. That argument is totally untenable as it runs counter to the clear words of s. 243 of the Act. I reject that argument outright.

The affidavit in encl. 47 in support of the application for a stay of the whole proceedings in encl. 48 was not rebutted by way of an affidavit. This point was strenuously advanced. I totally agree with Mr. Ong Ban Chai when he says that there was no need for the petitioner to reply to encl. 47 as the application in encl. 48 lacked the necessary jurisdictional flavour for this court to act upon. In my judgment, encl. 48 can only be entertained by this court after a winding-up order has been made. I said in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 MLJ 224 that an appeal does not operate automatically as a stay of execution and that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. What may amount to special circumstances is a question of fact in each case. It must be something distinctive and out of the way. An appeal to the Court of Appeal, like what is happening in the present case, and the argument that the present case has been fully litigated *vide* companies (winding-up) no: 28-41 of 1996 (that is an assertion which is totally incorrect as the matter was withdrawn) can never constitute special circumstances. I have anxiously considered the submissions of Mr. Hardip Singh and I could not find anything distinctive or out of the way to enable a stay to be granted. I had no choice but to disallow encl. 48 with costs.

On 20 November 1996, I heard the submissions of both parties in regard to encl. 2; it continued the next day at some length. I reserved decision till 27 November 1996 where I finally allowed encl. 2, para. 8 (a) and (c). I too appointed Mr. Soon Teck Kuan as the liquidator. The same arguments were advanced by Mr. Hardip Singh to challenge encl. 2. Nothing new was put forward by either Mr. Hardip Singh or Mr. Ong Ban Chai. It was emphasised by Mr. Ong Ban Chai that he was not relying on the statutory presumption of insolvency under s. 218 (2)(a) of the Act but rather he laid stress and relied

entirely on s. 218 (2)(c) of the Act in that the respondent was unable to pay its debts. That the respondent was indebted to the petitioner in Singapore currency to the tune of S$35,554 being the balance of the purchase price for goods sold and delivered together with interest thereon at the rate of 8% per annum from 31 December 1995 to the date of realisation was hardly challenged by the respondent in the several affidavits filed before this court. There are authorities for the proposition that having proved a debt, a petitioner is entitled to an order of winding-up: *Wei Group Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4; IOC *Australia Pty Ltd v. Mobil Oil Australia* [1975] 49 ALJR 176. In my judgment, the petitioner creditor who cannot obtain payment of their debt is entitled in law as between the petitioner creditor and the respondent debtor *ex debitio justitiae* to an order of winding-up provided the petitioner creditor bring their case within the Act. If authority is needed for this proposition, I have no hesitation to cite a few of them. References should be made to *Re London Suburban Bank* [1871] 6 Ch. App. 641, 643; *Re Western of Canada Oil, Lands and Works Co.* [1873] LR 17 Eq. 1; *Re Krasnapolsky Restaurant and Winter Gardens Co* [1892] 3 Ch 174; and *Re Globe Trust* [1915] WN 221. The petitioner creditor like the present case is not bound under the law to give time to the respondent debtor: *Re Home Assurance Association (No 2)* [1871] LR 12 Eq. 112; *Re International Contract Co, ex parte Spartali and Tabor* [1866] 1 Ch. App. 523. Lord Cranworth had occasion to say in *Bowes v. Hope Life Insurance and Guarantee Co.* [1865] 11 HL Cas. 389 that:

> It is not a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound-up or not, that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the Court to direct a winding-up.

As an unpaid creditor, once the petitioner proves insolvency they are entitled to a winding-up order, an order which Bowen LJ said in *Re Chapel House Colliery Co* [1883] 24 Ch. D 259 to be equivalent to an equitable execution.

The words "unable to pay its debts" which appear in s. 218(2)(c) of the Act are capable of being interpreted in two ways. One way would be that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets (*Re Chemical Plastics Ltd* [1951] VLR 136). The other way would be to look at insolvency in its commercial sense (*Re Capital Annuities Ltd* [1979] 1 WLR 170 at p. 187, that is more inclined to an inability to meet current demands (*Re Capital Annuities Ltd (supra)*). If the company is unable to meet current demands but is possessed of assets which, if realised, would enable it to discharge its liabilities in full, that company would still be wound-up. Thus, from the

various and numerous authorities this form of insolvency is principally a question of fact and it can be established in any number of ways. For example, it may be established or demonstrated that the company has failed to honour bills of exchange (*Re Globe New Patent Iron Co.* [1875] 20 Eq. 337 at p. 338); that a receiver for debenture-holders has taken possession of all the assets (*Re Lyric Club* [1892] 36 Sol. Jo. 801); that there are a large number of outstanding debts (see the list of the parties intending to appear at the petition as handed to the court by Mr. Ong Ban Chai) and unsatisfied judgments (see as an example the consent judgment of the Shah Alam Sessions Court) and on this point it is germane to refer to *Re Tweeds Garages Ltd* [1962] Ch. 406; that admissions have been made by the company or its solicitors of inability to pay (see the letter from Messrs S.K. Song dated 12 June 1996 in encl. 4 and reference must be made to *Re Great Northern Copper Co.* [1869] 20 LT 264).

Now, applying the test of commercial insolvency as exemplified in the early part of this judgment, it is my judgment that the petitioner succeeded in their petition in encl. 2 especially paras. 8 (a), (c) and Mr. Soon Teck Kuan was appointed as the liquidator.